

GOLDART SDN BHD*a*

v.

YONG TOONG WAH

HIGH COURT MALAYA, PENANG

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RK NATHAN J

[ORIGINATING MOTION NO: 25-7-2003]

19 NOVEMBER 2003

LABOUR LAW: *Dismissal - Certiorari - Whether Industrial Court erred in ruling that dismissal was without just cause or excuse*

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The respondent had refused to go on transfer as instructed by his employer/ applicant for reason that he had not been paid his sales commission, salary and EPF contributions. The refusal led to the respondent's dismissal from the applicant's employment. Before the Industrial Court, the applicant *inter alia* produced a letter dated 22 April 1997, allegedly written by the respondent, testifying that the respondent had voluntarily resigned from his employment with immediate effect. The respondent denied writing or sending the letter, and on the contrary adduced evidence, which was not denied, that he had been reporting for work until 26 April 1997 and only stopped work on 27 April 1997 when his punch card was removed or taken away. Evidence was further adduced, which was again not denied, that the respondent, upon commencing employment, had been forced by the applicant to sign a blank piece of paper. Accepting the respondent's version of the evidence, the Industrial Court ruled that the respondent was right in defying the transfer order in the circumstances, was being dismissed without just cause and excuse and hence ordered payment of backwages, commissions etc. to the respondent. Dissatisfied, the applicant applied for an order of *certiorari* to quash the said decision of the court.

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Held (dismissing the application):

[1] The respondent was justified in refusing to go on the transfer until all his dues had been paid. More so upon the ambiguous letters of the applicant to the respondent which failed to state with clarity that all dues due to the respondent would be paid when he reported for duty at Johor Bahru. (s. 183 g)

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[2] The Industrial Court was right in accepting the respondent's evidence on the resignation letter. Why would the respondent continue to report for work if he had tendered his resignation on 22 April 1997 and with immediate

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- a* effect; more so when considering the applicant's evidence that the respondent had tendered his resignation because he wanted to avoid action being taken against him for non-performance and for refusing to go on transfer. It did not make sense that the respondent would continue to work, knowing that he could get into trouble and further having already tendered
- b* his resignation with immediate effect. (pp 184 h-i & 185 a)

[3] It was obvious that the applicant had used the respondent's pre-signed blank sheet of paper as the respondent's resignation letter. The respondent had not therefore resigned voluntarily but had been dismissed by the applicant. (p 185 e)

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Case(s) referred to:

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal
[1995] 3 CLJ 344 FC (*refd*)

For the applicant - Mathews George; M/s Danaraj Mathews Jimmy & Sara

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For the respondent - N Shanmugam; M/s Shanmugam & Gooi

Reported by WA Sharif

JUDGMENT

e **RK Nathan J:**

Facts

- The respondent was an employee of the applicant. The respondent claimed that he was unfairly dismissed by the applicant and therefore he commenced proceedings in the Industrial Court which ruled that the respondent was
- f* dismissed without just cause and excuse. Rather than reinstating the respondent, the Industrial Court awarded back wages and commissions from the date of dismissal. The applicant obtained leave to apply for an Order of *certiorari* to quash the order of the Industrial Court.

g **Findings Of The Court**

Respondent's refusal to go on transfer

- The first ground on which the applicant launched this judicial review was on the basis that the respondent had refused to comply with a transfer order ordering him to report for duty at the Branch Office at Johor Bahru. The
- h* respondent however justified his refusal on the ground that he was not paid his sales commission since 1995 and his February salary for 1997 and his EPF contributions which the company had asked him to pay first. The Industrial Court ruled that the respondent was right in not going on the transfer because he was not paid his dues.

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Before me the applicant argued that the Industrial Court erred in arriving at its conclusion because an employer has the power to transfer its employees at its absolute discretion. That may be so, but surely, in this case if the applicant was sincere in its transfer order with no malicious intent motivating it, then there was no reason why the applicant had withheld the respondent's due commissions and salary, besides asking the respondent to advance first the employer's share of the EPF contribution. In fact the respondent had, by a letter dated 15 March 1997 and as a final request, asked for the release of his salary and sales commission. Counsel for the applicant submitted that the applicant had indeed by its letters dated 17 March 1997 and 3 April 1997, acknowledged that monies were due to the respondent and that the same would be paid to the respondent when he reported for work at Johor Bahru. For the purposes of considering the effectiveness of this argument it is necessary to reproduce the last lines of the two letters. The last line of the letter dated 17 March 1997 reads, "We will reimburse you your six months incentives at GA in Johor Bahru". The last line of the letter dated 3 April 1997 reads, "We will reimburse your claims in our office here".

The Concise Oxford Dictionary, 9th edn defines 'reimburse' as 'repay (a person who has expended money); repay (a person's expenses)'. To my mind the two letters merely give the impression that the applicant would reimburse the respondent his expenses incurred in the transfer from Penang to Johor Bahru. If the applicant had actually intended to refer to the sales commission due from 1995 and the February salary for 1997, then there is no reason why the word 'reimburse' was used. The letter should have said that the due sales commissions and the February salary would be paid in Johor Bahru. Any ambiguity must be construed in the respondent's favour. The respondent was justified in refusing to go on the transfer until all his dues had been paid more so upon the ambiguous letters of the applicant to the respondent which failed to state with clarity that all dues due to the respondent would be paid when he reported for duty at Johor Bahru.

Did the respondent resign or was he dismissed

The applicant contended that the respondent had voluntarily resigned whereas the respondent refutes this. To consider this issue it is necessary to reproduce the brief letter of resignation from the respondent to the applicant. It reads as follows:

a TONY YONG TOONG WAH
11, JALAN GANGSA,
BAGAN AJAM, 13000 BUTTERWORTH.

22nd April 1997

b The Management, Goldart Sdn Bhd

Dear Sir,

Ref: Letter of Resignation

I hereby wish to tender my resignation with effect from today's date.

c I take this opportunity to thank the company for all the assistance during my tenure of employment.

Yours faithfully,

d (Sgd.) Tony Yong

It was the respondent's case that whilst he had admitted that the said letter bore his signature, he however contended that he was forced to sign a blank piece of paper in 1995 or 1996. The Industrial Court accepted the respondent's evidence on this.

e The applicant however contends that no reasonable person, more so an experienced employee like the respondent would sign a blank piece of paper. The applicant also complained that the Industrial Court failed to appreciate that a party who signed any document was bound by the contents of the said document.

f The purported letter of resignation was dated 22 April 1997 and the resignation was to take effect that very day. However evidence was led that the respondent had worked till 26 April 1997. The respondent gave evidence that as usual he had reported for work on 27 April 1997 but found that his punch card had been removed. The respondent's evidence was that he was not aware of his purported resignation until 24 April 1997 when he received the applicant's letter accepting his resignation. The respondent had, the very next day, replied stating that he had never written such a letter. Whilst admitting that the signature on the said resignation letter was his, the respondent denied that he had sent the said letter.

g I agree and accept the reasoning of the Industrial Court on this issue. Why would the respondent continue to report for work if he had tendered his resignation on 22 April 1997 and with immediate effect; more so when

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considering the applicant's evidence that the respondent had tendered his resignation because he wanted to avoid action being taken against him for non-performance and for refusing to go on transfer. It is my judgment that for the reasons propounded by the applicant, it does not make sense for the respondent to continue to work, knowing that he could get into trouble and further having already tendered his resignation with immediate effect. Further to compound the issue, the applicant did not reply to the letter dated 25 April 1997 from the respondent denying that he had resigned and did not also take any action to recover the one month's salary from the respondent *in lieu* of one month's notice of intention to resign.

The respondent explained that sometime in 1995 or in the beginning of 1996 he was asked to sign on a blank piece of paper together with other colleagues in Johor Bahru. One Jessica Poh, the secretary to the chairman had persuaded him to sign on the blank piece of paper. She had told him that everyone had to sign or the boss would make him leave the company. This evidence was corroborated by one Tham Wong Fak who had previously worked for the applicant and who had to also sign on a blank piece of paper at the request of the same Jessica Poh who had also told him that he would lose his job if he did not sign the said blank piece of paper.

It is obvious that the applicant had used the respondent's pre-signed blank sheet of paper as the respondent's resignation letter. I therefore held that the respondent had not resigned voluntarily but that he was dismissed.

Respondent's Poor Work Performance

The applicant had in its pleadings and in its evidence contended that the respondent's work performance was poor. The applicant's evidence was that the respondent's sales performances were not up to par. In fact the applicant issued the transfer order to Johor Bahru because it wanted the respondent to get training from senior staff at Johor Bahru. With such admission, the plea that the poor work performance of the respondent was one of the grounds for dismissal cannot hold water. After all, the applicant was willing to continue to employ the respondent, *albeit*, in Johor Bahru. If the work performance was a factor and if the respondent was incorrigible and incapable of bettering himself, then the respondent ought not to have been subjected to the transfer to Johor Bahru, but instead his poor work performance ought to have been a factor for his immediate dismissal in Penang itself. The very fact that the applicant wanted the respondent to go to Johor Bahru to undergo the training meant that the applicant had appreciated the fact that the respondent would improve his work performance with enhanced training. I am of the view that the Industrial Court was correct when it held that "non performance is not the issue here. It was

- a* only given as a possible excuse of why the claimant had resigned". The question of the respondent's non-performance is certainly not an issue for dismissal in this case.

- b* It is appropriate for a judge of the High Court to bear in mind the salutary advice of the Federal Court as stated in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 FC. This is what Mohd Azmi bin Haji Kamaruddin FCJ said at p. 348:

- c* In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, are so devoid of any plausible justification that no reasonable person or body of persons could have reached them.

- d* In the circumstances I had no hesitation in dismissing the applicant's call for judicial review of the decision of the Industrial Court, with costs.

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